Charlotte Amphitheater Corporation d/b/a Blockbuster Pavilion *and* International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, Local 322. Cases 11–CA–14684, 11–CA–14898, and 11–CA–14996

June 27, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On April 28, 1993, Administrative Law Judge Donald R. Holley issued the attached decision.

The Respondent filed exceptions, a supporting brief, a reply brief, an answering brief, and a motion to reopen the record. The Charging Party filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

The Respondent has moved to reopen the record to introduce evidence that in 1993 it placed on its ''active work roster approximately thirteen of the twenty Union adherents who were identified as bona fide complainants'' in this case and that ''over sixty percent of the alleged discriminatees'' are now working for the Respondent. In these circumstances, the Respondent argues that a remedial bargaining order issued under *NLRB v. Gissel Packing Co*., 395 U.S. 575, 614 (1969), is no longer warranted. For the following reasons, we disagree and we deny the motion to reopen.

The Board continues to adhere to the view that the determination whether a *Gissel* bargaining order is warranted in a given case should be made on an evaluation of the circumstances at the time the unfair labor practices were committed. *Action Auto Stores*, 298 NLRB 875 (1990), enfd. mem. 951 F.2d 349 (6th Cir. 1991), citing *Highland Plastics*, 256 NLRB 146, 147 (1981).[4] Thus, evidence of the employment of discriminatees subsequent to the unfair labor practice hearing, such as that proffered by the Respondent, is not relevant to a determination of the propriety of issuing a bargaining order. In any event, even assuming the accuracy and relevance of the proffer, we find no reason for vacating the bargaining order. The violations committed by the Respondent were numerous, serious, and affected a large number of employees, as the judge correctly noted. That the Respondent has placed a number of the discriminatees on its 1993 work roster will not necessarily reassure all the employees exposed to the Respondent's strong expressions of animus, including threats of closure, that they would risk nothing in supporting the Union in any renewed organizing campaign. Further, the asserted fact that the Respondent offered employment in 1993 to employees who were discriminated against in 1992, without making them whole for the period of discrimination, is hardly an assurance to those employees that they can engage

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that in sec. II,C, of his decision, the judge erroneously attributed certain statements made to employee Katherine Canady in 1992 to Crew Chief McKinney rather than Crew Chief Panter. This error does not affect our adoption of the judge's finding.

In adopting the judge's finding that the Respondent's crew chiefs were statutory supervisors, we find it unnecessary to rely on the crew chiefs' purported evaluation authority.

In adopting the judge's analysis and findings with respect to the Union's majority status at the time it made a valid demand for recognition in 1991, we note that the Union had obtained majority status even if, as the Respondent alleges, Katherine Canady, Jim McManus, and Janice Lorenz should not be counted as 1991 employees. We note in this connection that, contrary to the Respondent's assertion, the judge did not include Susan Lorenz in the unit nor count her authorization card in determining the Union's majority status.

[2] In adopting the judge's conclusions that the Respondent discriminated against James Shumaker in 1991 and Katherine Canady in 1992 in violation of Sec. 8(a)(3) and (1) of the Act but did not violate Sec. 8(a)(3) when it stopped assigning Michael Kelly in 1991, we note that, although the judge does not explicitly refer to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), his analysis is consistent with that decision. Further, we adopt the judge's conclusion that the Respondent violated Sec. 8(a)(3) by using Canady more sparingly after July 16, 1992, than it had before that time. In so doing, we note that, although the judge refers to testimony at the hearing regarding Canady's work performance, the Respondent has at no point in this proceeding relied on any work-related problems concerning Canady in defending its alleged action and instead simply denies that it failed to call her.

In adopting the judge's dismissal of the 8(a)(3) allegation with respect to Kelly, we note that the record evidence establishes that Kelly's overtime complaints had no connection with the Union and concerned only himself. They therefore did not constitute concerted activity under Sec. 7.

Finally, in adopting the judge's conclusion that the Respondent did not violate Sec. 8(a)(3) with respect to employees Larry Carter, Bob Donnell, and Jim Duncan, we rely on the General Counsel's failure to establish that they were interested in and available for reemployment, in light of the judge's discrediting of their asserted reasons for not attending the March 3, 1992 meeting and the absence of evidence that they had attempted to apply.

[3] In adopting the judge's recommended Order, we shall delete his reference to the 1993 season, and we leave to the compliance stage of this proceeding the determination of the manner in which the Respondent should make whole and offer employment to the 20 former employees it failed to consider for reemployment in 1992.

[4] Member Cohen does not necessarily agree that events subsequent to the commission of the unfair labor practices can never be relevant to the *Gissel* issue. However, he agrees in this case that the subsequent events, as alleged, are insufficient to preclude the entry of a *Gissel* order.

in protected activity without suffering adverse consequences. In short, in the words of *Gissel*, we find that even assuming circumstances as represented in the Respondent's proffer, ''the possibility of erasing the effects of past practices and of assuring a fair election . . . by the use of traditional remedies . . . is slight,'' and the ''employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order.'' Id. at 614–615.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Charlotte Amphitheater Corporation d/b/a Blockbuster Pavilion, Charlotte, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Make whole employees James Shumaker, Katherine Canady, and the 20 employees named in the remedy section of the decision for loss of earnings they suffered as a result of the discrimination against them, with interest, and offer immediate employment as stagehands to the 20 employees whose names are set forth herein.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT inform employees they were denied work opportunities because they engaged in union activities.

WE WILL NOT threaten you with discharge if you engage in union activity.

WE WILL NOT threaten to burn our facility before allowing the Union to represent employees.

WE WILL NOT interrogate you concerning your union sentiments and the union sentiments of other employees.

WE WILL NOT deny you work opportunities because you join or support the Union.

WE WILL NOT refuse to consider former employees for employment in order to undermine the strength and majority standing of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole employees James Shumaker, Katherine Canady, Amanda Ayers, Bob Bergen, John Broadus, Dean Burchett, Laura Carter, Byron Fleming, Bruce Grier, Karl Hoffman, Benjamin Howe, P. W. Jenkins, Mike Kelly, Michael Mariette, Mike Murphy, Michael Neely, Sharon Redmond, James Shumaker, David Stevens, Craig Taylor, Carl Welch, and James Holman, with interest, and offer those employees who were not considered for employment in 1992 immediate employment as stagehands.

WE WILL recognize and, on request, bargain in good faith with International Alliance of Theatrical Stage Employees and Moving Picture Operators, Local 322 as the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit set forth below and, if an understanding is reached, reduce the agreement to writing and sign it. The appropriate unit is:

> All riggers, spot light operators, loaders, forklift operators, stage craft and wardrobe employees employed by Respondent at its Charlotte, North Carolina facility excluding all other employees, guards and supervisors as defined in the Act.

CHARLOTTE AMPHITHEATER CORPORATION D/B/A BLOCKBUSTER PAVILION

Jasper C. Brown Jr., Esq., for the General Counsel.
Ralph J. Zatzkis, Esq. and *Stephen J. Roppolo, Esq. (McGlinchey, Stafford, Cellini & Lang)*, of New Orleans, Louisiana, for the Respondent.
Joseph Arnold, Esq., of Miami, Florida, for the Respondent.
Joel A. Smith, Esq. (Kahn, Smith & Collins), of Baltimore, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. On an original charge filed in Case 11–CA–14684 by International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, Local 322 (the Union) on October 16, 1991,[1] amended on November 29, and an original charge filed in Case 11–CA–14898 on March 4, 1992, amended on April 30, 1992, the Regional Director for Region 11 of the National Labor Relations Board issued an order consolidating cases and a complaint on April 30, 1992, which alleged that Charlotte Amphitheater Corporation d/b/a Blockbuster Pavilion (Respondent) had engaged in, and was engaging in, conduct which violates Section 8(a)(1) and (3) of the National Labor Relations Act. Respondent filed timely an answer denying that it had violated the Act as alleged. Thereafter, the charge in Case 11–CA–14996 was filed on May 11, 1992, and on June 6, 1992, the Region consolidated that case with the above-mentioned cases and issued an amended complaint, which realleged the matter set forth in the earlier complaint and additionally alleged that Respondent had engaged in, and

[1] All dates are in 1991 unless otherwise indicated.

was engaging in, conduct which violates Section 8(a)(5) of the Act. Respondent filed timely answer denying that it had violated the Act as alleged in the amended complaint.

The case was heard at Kannapolis and Charlotte, North Carolina locations during the period October 26 to December 3, 1992. All parties appeared and were afforded the opportunity to participate.[2] On the entire record, including careful consideration of posthearing briefs filed by the parties,[3] and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation authorized to do business in Florida, has a facility in Charlotte, North Carolina, where it is engaged in the operation of an outdoor amphitheater for public entertainment. During the 12-month period preceding issuance of the original complaint, it derived gross revenues exceeding $500,000 and it purchased goods valued in excess of $5000 directly from points located outside the State of North Carolina. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, Local 322 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent Charlotte Amphitheater Corporation[4] opened a new outdoor entertainment pavilion in Charlotte, North Carolina, on July 4, 1991. In advertisement, Respondent is billed as Blockbuster Pavilion. The facility was designed to accommodate approximately 20,000 patrons, but its seating capacity is considerably less. Some 22 events were staged at the facility in 1991, and 29 were staged in 1992. Weather permitting, the season extends from April to November.

When events are staged at Respondent's pavilion, it obtains and employs the stagehands who unload and load the trucks, perform the electrical work, carpentry, rigger functions, sound work, prop work, and wardrobe work necessary to present the event.[5] Employees who unload the trucks and assist in the performance of work which must be performed before the show begins work what is called the ''in.'' Those who operate spotlights, change scenery, or perform other work during the production do work what is called the ''show.'' Those who remove equipment from the stage and reload the trucks after the performance do work what is called the ''out.'' Robert (Rusty) Vernon, who was hired as Respondent's general manager in December 1991, estimated the size of the stagehand pool in the Charlotte, North Carolina area to be 250–300. Few of the area stagehands work continuously for a given employer. Instead, they work at different facilities as shows or events are staged, and stagehands are needed. In addition to Respondent, some of the facilities in the Charlotte area which employ stagehands are the Charlotte Coliseum, the Charlotte Convention Center, Ovens Auditorium, and Carolina's Palladium Amphitheater.

Leslie Sprinkle, Local 322's business agent, credibly testified that in 1991, Respondent provided most of the summertime employment enjoyed by his stagehand members. Respondent's season began on July 4, 1991, and the record reveals it obtained experienced stagehands by employing a number of stagehands who belonged to Local 322 and made that known by noting their membership and/or affiliation on the employment applications which they completed for Respondent. The record further reveals that Respondent hired stagehands throughout the 1991 season.

At or about the time that Respondent opened the Charlotte facility, the Union's International office contacted Respondent's corporate attorney, Joel Arnold, in an attempt to obtain voluntary recognition of the Union. Simultaneously, the signatures of employees working Respondent's events were solicited, and on August 28, 1991, the Union filed the petition in Case 11–RC–5796. When Arnold agreed to meet with union principals at the facility on October 4, 1991, the petition was withdrawn as International Official John Petrofessa advised the local officials that voluntary recognition might be forthcoming. At some point, Sprinkle prepared a proposal placed in the record as the General Counsel's Exhibit 62. The document proposed hourly rates for stagehands during 1991 and 1992 of $10 to $16.50, with the rate for stewards varying from $12 to $18. Overtime after 8 hours and a 5-percent wage increase in 1993 were proposed. During 1991 and 1992, the hourly rate paid by Respondent for stagehands varied from $8 to $12.50.

On October 4, 1991, Respondent and union principals met at the Charlotte facility. Present for the Union were: John Petrofessa; Tom Weeks, an international representative; Tom Howard, the Local's president; and for Respondent were: Joel Arnold and Alan Flexer, chief operating officers. Respondent's part-owner, Buffman, was in the facility but chose not to attend the meeting.

---

[2] At the outset of the hearing, the General Counsel was permitted to amend the complaint to: add to par. 8(h) an allegation that Duncan unlawfully interrogated employees on May 31, 1992; allege as par. 8(i) that Jack Panter threatened employees with loss of employment because they engaged in union activity on July 10, August 12 and 14, 1992; allege as par. 8(j) that Panter orally promulgated a rule prohibiting employees from engaging in discussion of the Union on August 12, 1992; withdraw the names of Michael Andrews and Kenny Love from par. 10 of the complaint; change the date of alleged discrimination against Katherine Canady from March 3 to July 16, 1992; change the name of Amanda Mayers in par. 10 of the complaint to Amanda Ayers.

[3] Respondent's tardy motion to file a reply memorandum, which is opposed by General Counsel, is denied.

[4] Respondent is 100 percent owned by Amphitheater Entertainment Corporation, which is 50 percent owned by Zev Buffman and 50 percent owned by Blockbuster Amphitheater Corporation. Blockbuster Amphitheater Corporation is a wholly owned subsidiary of Blockbuster Entertainment Corporation, a New York stock exchange company. Charging Party requests in its brief that Amphitheater Entertainment Corporation be noted as a party herein because it and Respondent constitute a single employer and/or alter egos. In the absence of appropriate complaint allegations, I deny the request.

[5] At times, the road act or independent contractors will perform wardrobe and other functions.

Arnold's description of the meeting was brief. He claimed the union people indicated during the meeting that they would like to get work at the facility like they got it at the Charlotte Coliseum—without a contract. He claimed Respondent agreed to give them work whenever it fit into their plans. Arnold denied that the subject of recognition came up during the meeting. Union President Howard gave the most complete and most credible account of the meeting. He testified that, after some preliminary discussion, Arnold asked Sprinkle if he wanted a signed contract, and that when Sprinkle said yes, Arnold said there was no way Blockbuster would ever sign a collective-bargaining agreement; they would not be the first shed in the country to sign one. Howard claims Arnold then asked Sprinkle if he wanted a relationship in which Blockbuster called the Union for hands and the Union sent hands out there. He recalled that Sprinkle said yes. According to Howard, Flexer then made some remarks about alleged unfair labor practices, and he asked whether the Union had a majority and had the cards there. The union representatives indicated they represented a majority and the cards had been given to the Board. Howard recalled that Sprinkle gave Flexer a copy of the basic rate sheet Petrofessa had previously given to Arnold, and Flexer said they would look it over and get back to him.

Respondent's 1991 season ended with the Tom Petty show on October 15, 1991. The Union picketed the show, and Sprinkle indicated it picketed Respondent continuously during the 1992 season.

On February 26 and March 3, 1992, Respondent met with individuals who were to comprise its list of stagehands who were to work for it during the 1992 season.

The complaint alleges, and the General Counsel contends, that subsequent to the time the Union commenced its organization campaign at Respondent in August 1991, Respondent, through the conduct of its crew chiefs, Sean McKinney and Jack Panter, and its production manager, Gerry Duncan, violated Section 8(a)(1) of the Act in numerous respects. Additionally, the complaint alleges that employees Michael Kelly and James Shumaker were discriminatorily denied employment during the 1991 season, and that Respondent discriminatorily refused to hire the employees named in paragraph 10 of the complaint during the 1992 season. Finally, the complaint alleges that the Union has represented a majority of Respondent's employees since August 28, 1991, and that by refusing to recognize it as the bargaining agent of its employees, Respondent violated Section 8(a)(5) of the Act. Additionally, the General Counsel contends the unfair labor practices committed by Respondent were sufficiently serious as to warrant the issuance of a bargaining order. The individual allegations are treated below.

B. *The Alleged 8(a)(1) Conduct*

1. The status of crew chiefs

Most of the alleged 8(a)(1) conduct described in the complaint is attributed to Respondent's 1991 crew chief, Sean McKinney, and its 1992 crew chief, Jack Panter. Although Respondent originally admitted in its answers to the complaints that McKinney and Panter were supervisors within the meaning of Section 2(11) of the Act and were agents of Respondent within the meaning of the Act, it amended its answer at the conclusion of the General Counsel's case to deny that McKinney and Panter were supervisors. Similarly, it denied that they were authorized agents of Respondent.

As indicated, supra, the size of the stagehand pool in the Charlotte area is 250–300 individuals. During the 1991 season, approximately 97 members of the pool filed employment applications with Respondent and they were placed on its call list, which was placed in the record as Joint Exhibit 1(b). During the 1992 season, the stagehand call list contained some 115 names. Respondent's general manager, Vernon, indicated during his testimony that approximately 28 stagehands are usually needed for the average show. He further indicated that the actual number needed is specified by the contract which Respondent executes with the performing group. More precisely, the group's needs are normally set forth in a technical rider to the contract.

The record fails to reveal that crew chiefs participate in the formulation of contracts, including technical riders, which are negotiated by Respondent and any given performing group. Vernon claimed during his testimony that the crew chiefs take no part in deciding which employees are placed on the call list. Crew Chief Panter's testimony, coupled with that of employee Susanne McCown, indicates otherwise. Thus, McCown credibly testified that in early 1992 Panter urged her to complete an employment application so he could hire her as a stagehand during the 1992 season. She testified that on March 18, 1992, she, accompanied by one Thomas Lynn, visited Panter at his home and, while there, she and Lynn both filled out employment applications and other forms, including W–4 Employee Withholding Allowance Certificates. (See C.P. Exhs. 10, 11, 37, 38, 39, 41, 42, and 43.) Panter claimed during his testimony that McCown and Lynn actually visited his home at some unknown time in February 1992 rather than on March 18, 1992, and he further claimed he handed in McCown and Lynn's paperwork at a meeting held at the Hilton Hotel on February 26, 1992, together with his own W–4 form and his NC–4 form. His claim is belied by several factors. First, he admitted he initialed Lynn's application at the top immediately above the date ''03–18–92''; that he wrote the words ''stagehand'' and ''loader'' on the document and he admitted that the dates on the documents were not altered after being placed on them. Next, during cross-examination, Panter's W–4 and NC–4 forms, which were allegedly turned over to Respondent on February 26, 1992, were placed in evidence and they were dated March 4, 1992. McCown and Lynn were both placed on the call list for 1992, and McCown testified, without contradiction, that she worked frequently during the 1992 season and that Lynn also worked. In sum, the record clearly reveals that Panter caused McCown and Lynn's names to be placed on the 1992 call list, and his actions led to the employment of those individuals in 1992.

Through the testimony of Panter, Duncan, and Vernon, Respondent sought to establish that, although the crew chief selected the employees who would be called to fill Respondent's need for stagehands at any given time, the crew chief exercised little discretion or independent judgment when dispatching or filling such quotas. In this vein, they claimed that the skill of the various individuals and their availability determined whether they received a call to work a show. Panter indicated during his testimony, however, that he favored certain employees when deciding who he would call for work. Thus, he admitted that he called employees John Taylor, Ann

Taylor, and Michael Andrews for virtually every show because they were skilled and ''they needed work.'' Similarly, he testified that Fowler informed him he would only work if he was given assignments longer than the 3-hour minimum, and he accommodated Fowler by scheduling him to work with both the ''in'' and the ''out'' so he would work longer than 3 hours. Clearly, Panter, while in the crew chief position, had and exercised complete discretion when calling persons from the call list to fill the stagehand quota for any given production. Patently, when performing the so-called dispatching function, he exercised marked independent judgment.

The record reveals that when those employees who were chosen by the crew chief to work a given function arrived at the facility, the crew chief noted their time of arrival. Vernon, Duncan, and Panter all claimed during their testimony that when stagehands reported for work, the crew chief would merely tell them which road person they would be working for, and that persons with the road group or Duncan would provide all of their immediate supervision while they were at the facility. In point of fact, the record reveals that the crew chief actually supervises stagehands to a certain extent, he is responsible for keeping accurate records of the time they work, and, to a certain extent, the crew chief determines how long employees will work.

With respect to the crew chief's supervision of the work of stagehands, employees Katherine Canady and Susanne McCown described an incident which occurred on July 10, 1992. On that date, the two employees were assigned to perform work on stage beneath two riggers who were in the process of lowering equipment that was located above the stage. Canady testified that while a motor was being lowered, she and McCown stepped away from their work because of the danger posed by the overhead work. When Panter observed the two stagehands cease work, he approached them and told them to get to work. McCown walked away and Canady explained to Panter that she had temporarily ceased work because she did not feel it was safe to work under the riggers at that time. Canady testified Panter yelled at her when she turned and walked away. Later in the day, Canady claims Panter called her off to the side, shook his finger in her face, and told her he was aware she was a union member; that he would determine what was safe and unsafe for her; that he was her boss and he could fire her at any point.

Panter, as well as numerous employee witnesses, indicated during their testimony that the crew chief maintained the records which revealed the time worked by each stagehand during any given production or event. While Vernon and Duncan claimed that road crew personnel decided when a stagehand's work was completed, the record reveals, and Panter admitted, that after the stagehands completed their production related work, the crew chief, particularly during McKinney's reign, required them to remain at the facility for one-half hour or so, during which time the crew chief critiqued their performance and discussed safety matters with them. Apparently, what the crew chiefs covered during such meetings was left to their complete discretion.

McKinney was not called as a witness by Respondent. When the personnel files of the stagehands who had worked during the 1991 season were produced, Charging Party's counsel extracted performance evaluations which were placed in the record as Charging Party's Exhibits 20–35 in evidence. The parties stipulated such documents were performance evaluations for stagehands who worked during the 1991 season. Duncan, who supposedly provided immediate supervision for stagehands, testified the performance evaluations were not prepared by him; that the writing looked like McKinney's. In the absence of evidence to the contrary, I find the described performance evaluations were prepared by McKinney.

In sum, the record reveals that Respondent's crew chiefs, acting entirely independently, decide which stagehands on Respondent's call lists will work events. Moreover, the record reveals that crew chiefs participate meaningfully in employee recruitment; that they are solely responsible for maintaining time records; that they discipline employees; and that, at least until charges were filed here, they prepared employee evaluations which were made a part of the employees' personnel files. I find that crew chiefs exercise considerable independent judgment in the performance of their duties and that they are, as alleged, supervisors within the meaning of Section 2(11) of the Act.

2. Unlawful conduct attributed to Sean McKinney

Paragraph 8(a) of the complaint alleges that on or about September 12, 1991, McKinney informed an employee he had not been assigned work opportunities because of his union activities. The General Counsel sought to prove the allegation through the testimony of employee Michael Kelly.

Kelly testified that he and some 10 or so employees worked the first show at Respondent on July 4, 1991, and that after the show McKinney met with them and told them they had done a good job and that he would consider them as a core group that would work every show. He indicated that he was thereafter called to work the next 10 shows as were many in the so-called core group. Kelly testified Respondent ceased to call him to work shows after August 16, 1991, and that when he went to pick up his paycheck for August work on September 12, 1991, he discussed the matter with McKinney by asking why he was not getting a call any more. He recalled McKinney told him he tried to do the core group thing but something did not work out and Gerry Duncan was making some of the calls now; and then he said, ''But just between you and me it might have something to do with that logo you're wearing on your tee-shirt.'' Kelly indicated he was wearing a T-shirt with a union logo on it at the time.

McKinney did not testify, so Kelly's testimony stands unrefuted. Accordingly, I find, as alleged, that by telling an employee he had been denied work opportunities because he engaged in union activities, Respondent violated Section 8(a)(1) of the Act.

Paragraphs 8(b) through 8(e) of the complaint allege that during the course of an employee meeting held on August 24, 1991, McKinney:

> Threatened employees with discharge if they informed the Union of statements made at an employee meeting; threatened employees that if they joined the Union they would not receive work because of the Union; threatened employees that Respondent's owners would destroy the property before they would allow a union to organize its employees; threatened employees that any employee who signed a union authorization card would

> be terminated; and threatened employees that all stagehands employed by Respondent who signed authorization cards would be terminated and replaced.

The General Counsel sought to prove the allegations through testimony given by employees James Holman, Michael Neely, John Broadus, David Stevens, and James Shumaker. Collectively, their unrefuted testimony reveals that at the conclusion of the ''out'' on August 24, 1991, McKinney released all the stagehands he knew to be affiliated with the Union, and he told the remaining 20–24 stagehands he wanted to meet with them in the breakroom. He started his meeting by observing the union people were gone and by stating that, if any of those attending the meeting repeated what was said to the Union, he would know where it came from and he would fire all of them. McKinney then told the employees it would cost them $600 to $700 to join the Union; that they would be tested and many would fail; and that the Union might strike and starve them to death. He told them that Blockbuster would burn the building before they would let the Union get in, and he said that if all 82 stagehands filled in cards, Blockbuster would fire them all and hire 82 new stagehands. At some point during the meeting, McKinney or Panter stated that the Union referred by seniority and new members would get little work.

As indicated, supra, McKinney did not appear to give testimony during the hearing. While Panter appeared and indicated McKinney frequently met with stagehands for approximately 30 minutes at the conclusion of the shows, he did not seek to describe what occurred on August 24, 1991. It is clear, and I find, that McKinney threatened those employees attending the meeting with discharge if they engaged in union activity, and he threatened that Respondent would burn its building before it allowed the Union to represent its employees. By engaging in such conduct, through the actions of McKinney, Respondent violated Section 8(a)(1) of the Act as alleged.

3. Unlawful conduct attributed to Gerry Duncan

Paragraph 8(g) of the complaint alleges that on or about September 12, 1991, Gerry Duncan threatened an employee with loss of work assignment if he joined the Union. The General Counsel sought to prove the allegation through the testimony given by employee James Shumaker.

Shumaker testified that on September 12, 1991, McKinney told him Duncan wanted to discuss his ''union stance'' with him backstage. He indicated he found Duncan backstage on the loading dock and the following conversation ensued:

> Mr. Duncan stated that if I went with my stance on the union card, we were going to be working approximately 70 shows next season, whereas I had worked almost every show the '91 season at Blockbuster. That I would be low priority on the calls if a union call was in effect. I wouldn't work nearly as many hours. I'd basically lose money because of having a union stance.
>
> I stated that I was glad to have the authorization card. I just wanted to finish my season. I didn't know whether a vote was going to take place, how any of this was going to happen. I didn't care to discuss it further. I just wanted to finish my obligated season at Blockbuster. I said that I hoped that he would rehire me for next year.

When he was asked if he recalled speaking with an employee about the Union on September 12, 1991, Duncan testified he recalled having such a conversation but could not recall who it was with. His recollection of the incident was as follows (Tr. 1080):

> I recall having a conversation, I'm not sure who it was with. I recall having a conversation and the employee asked me did I know anything about the Union. And I said the only thing I know about them is that they work on a seniority system and new people get placed on the list and that they take from the top of the list, and the people on the bottom may not get called at all. Strictly on a seniority system. That's all I said to them.

Duncan testified he had no recollection of any conversation with Shumaker, and he denied he told any employee he would not work at Blockbuster if he joined the Union.

Noting that McKinney was not produced as a witness by Respondent, employee Shumaker's claim that the crew chief told him that Duncan wished to discuss his union stance with him is unrefuted. I credit Shumaker and do not credit Duncan's claim that he could not recall talking with Shumaker and his inference that Shumaker initiated a discussion with him by asking if he knew anything about the Union. Nevertheless, it is apparent that the impact of Duncan's September 12 remarks to Shumaker was merely that if employees were referred to work at Respondent by the Union in 1992, new union members might not get as much work as they received in 1991 because the Union referred by seniority. Absent a showing that Duncan knowingly misrepresented the manner in which the Union refers members to employment, I find that the General Counsel has failed to prove that Respondent, through Duncan's September 12, 1991 comments, violated Section 8(a)(1) of the Act as alleged.

Paragraph 8(h) of the complaint alleges that Duncan interrogated employees concerning their union activities and concerning the union activities of others on or about March 3 and May 31, 1992. The General Counsel sought to prove the allegation through testimony given by employees Janice Lorenz and Katherine Canady.

Lorenz testified that she attended a meeting at Blockbuster on March 3, 1992, to update her 1991 employment information. As she was leaving the facility, she claims that Duncan pulled her aside and asked if she was affiliated with the IATSE. When she replied she had worked with them for the past 11 years, she recalled Duncan asked, ''Well, didn't you tell me last year that you were not a card holder?'' Lorenz testified that she said ''yes,'' and Duncan then asked, ''How about those other girls in the cafeteria?'' The employee asked ''Who?'' and Duncan replied, ''The one in black.'' Lorenz indicated Duncan was referring to Ann Taylor and that she informed him, ''Yes, she's the Financial Secretary for the Union.'' She recalled Duncan then said, ''She a card holder, isn't she,'' and that the conversation ended when she said, ''Yes, she is.''

Canady, Lorenz' daughter, indicated during her testimony that, while working at Respondent's facility on May 31, 1992, she wore her union identification card on a chain

around her neck. She claimed that Panter approached her, asked if he could look at her card, and that he fingered the card. She testified Panter then walked over to Duncan who was on the loading dock, and that the two men then approached her. Canady testified Duncan asked her if she was a union member, and she replied she was. She claims he then asked if her two brothers and her mother were members of the Union. She replied her brothers, who were employed by Respondent, were not members, but her mother was.

Duncan acknowledged during his testimony that he observed employees Lorenz and Taylor at the March 3, 1992 meeting. He did not seek to refute Lorenz' description of the conversation they had that day. Similarly, Duncan did not seek to refute employee Canady's version of the May 31, 1992 incident. With respect to Canady, he simply denied that he ever observed her wearing a union laminate. When he appeared as a witness, Panter denied that he ever fingered Canady's union identification laminate, and he denied that he or Duncan questioned Canady about her union membership or that of her brothers and mother. Panter impressed me as being the most insincere witness who attended the hearing. I credit Lorenz and Canady.

While the Board held in *Rossmore House*, 269 NLRB 1176 (1984), that an employer does not necessarily violate Section 8(a)(1) of the Act by questioning open and active union supporters about their union sentiments, it indicated a violation will be found if ''either the words themselves or the context in which they are used . . . suggest an element of coercion or interference.''

Here, the record clearly reveals that the March 3, 1992 meeting attended by employees Lorenz and Taylor was conducted to determine which employees would be placed on Respondent's call list for 1992. Lorenz' description of her conversation with Duncan reveals that Duncan did not know the employee to be an open and active supporter of the Union and, in any event, by asking the union sentiments of Taylor, Duncan placed Lorenz in a position in which she could logically fear that the inquiries were being undertaken pursuant to a plan to deny employment to her and Taylor. I find that by interrogating Lorenz about her union membership and the union sentiments of Taylor, Duncan engaged in conduct which violates Section 8(a)(1) of the Act. See *Kona 60 Minute Photo*, 277 NLRB 867 (1985).

Similarly, the context in which the Canady interrogation was conducted causes me to conclude that Duncan's actions reasonably tended to coerce Canady in the exercise of her right to join and support the Union. Thus, it appears that Canady was not known by Duncan to be an open supporter of the Union until Panter approached Duncan immediately after he had fingered the employee's union card. Immediately thereafter, Duncan engaged the employee in a conversation which was other than a casual conversation seeking general information. Indeed, he asked her to reveal her union sentiments and the sentiments of her brothers and her mother. In the circumstances which existed at the time, including the fact that many, if not most, of the union members who worked at Respondent during 1991 were not utilized by it in 1992, Canady could have reasonably feared Duncan was making his inquiries with an object of initiating action against her, her brothers, and her mother. I find that through Duncan's interrogation of Canady, Respondent violated Section 8(a)(1) of the Act as alleged.

4. Unlawful conduct attributed to Jack Panter

Paragraph 8(i) of the complaint alleges that on July 10 and August 12 and 14, 1992, Crew Chief Panter threatened employees with loss of employment because they engaged in union activities. Paragraph 8(j) of the complaint alleges that on August 12, 1992, Respondent orally promulgated a rule prohibiting employees from engaging in discussions about the Union. The allegations will be treated together as they involve actions taken by Panter against employee Katherine Canady.

As noted, above, on May 31, 1992, Panter fingered Canady's union identification card, asking if she was a union member. Subsequently, Duncan approached her and asked whether she, her brothers, and her mother were members of the Union.

Subsequently on July 10, 1992, while working the Indigo Girls concert, Canady was assigned to perform certain work on the stage of the facility. Riggers were working overhead at the time. At a point when the riggers were dropping a point with the aid of ropes and a motor, Canady and her work companion, Suzanne McCown, ceased work. Canady explained they did so because the riggers had previously dropped items and she did not feel safe working under them while they were dropping a point. Panter approached the employees and instructed them to resume work. Both employees walked off while Panter was yelling. Later in the evening, Panter took Canady aside, pointed his finger in her face, told her he was aware she was a union member; that he would determine what was safe and unsafe for her; that he was her boss and could fire her at any time; that she was to perform any job any place he wanted her to; and that they were wasting their time at the picket line because no one noticed and no one cared.

Canady testified that after the July 10 incident, she worked the Iron Maiden show on July 12 as she had been called for both the July 10 and 12 shows at the same time.

Although there were three shows at Respondent's facility between July 12 and August 12, 1992, Canady was not called to work any of the shows. She testified she called Panter on August 12 and asked why she had not been receiving any calls. She claims he said he did not like her union attitude; he didn't appreciate her speaking of the Union. Continuing, Canady testified Panter told her he was the one who made the calls and determined who did and did not get them, and if she did not quit promoting the Union to the employees, she would not receive calls.

Canady was called to work the Elton John show on August 14, 1992. During the show, she claims Panter took her aside to inform her that Blockbuster was going to buy the old Coliseum; that the Union would not be in that venue; and that she would not have a job. Canady testified that she worked the Lollapalooza Tour on August 25, 1992, and received no calls after that during Respondent's 1992 season.

Employee McCown testified that she, like Canady, refused to work while riggers were overhead on July 10, 1992. She testified that about 3 weeks after the incident, Panter called her and told her she should chose her friends more carefully, and that during the discussion he told her his reasons for disliking unions.

During his testimony, Panter acknowledged that he assigned Canady and McCown to perform a lighting task on the stage of the facility on July 10, 1992. He claimed that

when he observed that Canady was not performing the work, he told her she had to get back on her job and do what he had asked her to do. He denied that riggers were performing any work over Canady and McCown at the time. While Panter admitted he and Canady subsequently discussed the incident on the loading dock, he denied that he pointed his finger at her and claimed he merely apologized when she accused him of being rude. Panter did not seek to fully describe what was said during the loading dock incident.

Panter did not seek to controvert Canady's description of their August 12, 1992 telephone conversation. Instead, when asked what statements he made to her concerning a rule that she should not talk at work, he testified that he separated Canady and her brother A.G. when they were fussing at each other and told them to stay away from each other.

With respect to the conversation concerning Respondent's possible purchase of the old Charlotte Auditorium, Panter testified he made no statements about that matter directly to Canady, but, instead, simply participated in general conversation about the matter with the crew on the dock. He testified the Union was not mentioned in relation to the old Charlotte Auditorium.

Employees Canady and McCown testified in a straightforward manner, and both appeared to be attempting to completely describe what occurred during given incidents. Panter, on the other hand, testified in fragmentary fashion and he failed to admit or deny many of the remarks attributed to him by Canady. Moreover, I gained the distinct impression that he willingly tailored his testimony to meet the needs of Respondent's defense. I credit Canady and McCown where their testimony conflicts with that of Panter.

In sum, the testimony which I credit reveals that on July 10, 1992, while referring to Canady's union membership and the futility of picketing, Panter threatened that he could fire the employee at any time; and that on August 12, 1992, he told the employee that she had not received calls because of her union attitude, and, if she did not quit promoting the Union, she would not receive calls. Through Panter's described conduct, I find that Respondent violated Section 8(a)(1) of the Act as alleged on July 10 and August 12, 1992. Accepting Canady's version of the conversation involving the old Charlotte Auditorium and/or Coliseum, I find that testimony to be vague and insufficient to establish a violation of Section 8(a)(1) of the Act. Similarly, accepting Canady's description of Panter's admonition that she should refrain from talking about the Union if she wanted to receive calls, I find such testimony fails to prove that Respondent promulgated a rule which prohibited employees from talking about the Union or about August 12, 1992.

C. *The Alleged 8(a)(3) Violations*

1. The complaint alleges that Respondent failed to assign employees Mike Kelly and James M. Shumaker work on stated dates in 1991 because they engaged in union or other protected concerted activity. Additionally, it alleges, and the General Counsel contends, that Katherine Canady was denied work calls subsequent to July 16, 1992.

The facts relied on by the General Counsel to prove that Kelly was discriminatorily denied employment by Respondent from August 16, 1991, through the end of the 1991 season are set forth, supra. Briefly recapitulated, those facts, which were not rebutted, reveal: that Kelly was promised continuous employment as part of a core group at the outset of the 1991 season; that from August 16, 1991, forward, he received no calls; that he encountered McKinney on September 12, 1991, and inquired why he had received no calls; that McKinney told him Duncan was making some of the calls, ''But just between you and me it might have something to do with that logo you are wearing on your teeshirt''; that Kelly had on his union T-shirt at the time; and that Kelly thereafter telephoned McKinney to advise him he remained available for work, but he was not called for work during the remainder of the 1991 season.

While the above-related facts, standing alone, might warrant an inference that Kelly was denied employment after August 16 because he had made his union sentiments known, other record evidence convinces me such an inference is not warranted. Thus, employee James Holman testified that, during one of his meetings with the stagehands, McKinney informed those present that Kelly had called to the Labor Board to ask about Blockbuster not paying overtime after 40 hours and he said, ''If you do that you're a troublemaker and that that guy was out of here.'' In addition to the fact that Holman's testimony strongly suggests that Kelly was not called after August 16 because he either voiced or threatened to voice a complaint over Respondent's failure to pay him time and one-half for overtime hours, I note that the record reveals that numerous employees revealed their union affiliation during the 1991 season by noting their affiliation on their employment applications and by wearing T-shirts with union logos to work. With exception of Kelly and employee Shumaker, there is no claim that any of those employees suffered discriminatory treatment after revealing their union sentiments. Indeed, the record reveals that at some point during the 1991 season, McKinney obtained his riggers through an arrangement with the Union.

In sum, I am convinced that Respondent ceased to call Kelly for shows after August 16, 1991, because he contested their failure to pay him time and one-half for hours worked over 40 hours. I find that the General Counsel has failed to prove that the employees' participation in union and/or protected concerted activities was a motivating factor in Respondent's decision to refuse him employment.

The record reveals that employee Shumaker signed a union authorization card on August 10, 1991 (G.C. Exh. 22). He testified without contradiction that on September 8, 1991, McKinney indicated in conversation with him and Charlie Fisher that he could not believe how many people were going to side with the union stand on authorization cards; that a lot of people were going to lose work the following year because of it. He testified he told McKinney at that point, ''Look, I'm one of those people that signed an authorization card, you probably don't want to be talking to me about this.'' Shumaker testified that although he had been called to work every show at Respondent's facility up to the time of the above conversation, he was not called to work a show held on September 12, 1991. On that date, he attended the Foreigner Show, and, at McKinney's urging, discussed his ''union stance'' with Duncan, as indicated, supra. Shumaker testified that after missing the Foreigner Show on September 12, 1991, he received calls to work the remaining shows during the 1991 season. He did not work the final show, the Tom Petty show on October 15, 1991, because he honored the Union's picket line.

I find that the facts summarized above warrant an inference that Shumaker's participation in union activity was a ''motivating factor'' in Respondent's decision to refrain from calling him to work the Foreigner Show on September 12, 1991. Respondent offered no evidence to prove that it would have denied Shumaker work on September 12, 1991, in the absence of his participation in union activity. Accordingly, I find, as alleged, that by failing to call James M. Shumaker to work the Foreigner Show on September 12, 1991, Respondent violated Section 8(a)(3) of the Act as alleged.

The evidence offered by the General Counsel to prove that employee Katherine Canady was refused work after July 16, 1992, is set forth, supra. Briefly recapitulated, the record reveals that McKinney told the employee on July 10 that he was aware she was a union member, and he could fire her at any time if she failed to do what he told her to do; and that on August 12, when she called McKinney to ask why she had not received further calls after July 12, 1992, he told her: he did not like her union attitude; he did not appreciate her speaking of the Union; he made the calls and determined who did and did not get them; and if she did not quit promoting the Union to the employees, she would not receive calls. Finally, Canady testified that subsequent to July 10, 1992, the only work calls she received were for July 12 and August 14 and 25, 1992. Interestingly, her normal working companion, McCown, who was admonished by Panter to choose her friends more carefully about the end of July, testified she worked regularly through the 1992 season.

The evidence outlined above causes me to conclude that the General Counsel has adduced sufficient evidence to warrant an inference that Canady's support of the Union was a motivating factor in Respondent's decision to use her services sparingly after July 10, 1992.

As noted, supra, Crew Chief Panter denied that he made any remarks to Canady about her union sentiments or activities on July 10 and August 12, 1992. I have not credited those denials. While he indicated during his testimony that he felt Canady had been insubordinate on July 10, 1992, he claimed he had received complaints that she was not pulling her weight, and he had observed her talking for extended periods, he failed to affirmatively indicate why he called her only two times after July 10, 1992, and why he failed to call her at all after August 25, 1992.

In sum, I find that Respondent failed to prove that it would have limited Canady's work opportunities after July 16, 1992, in the absence of her participation in protected conduct.

2. The complaint alleges that Respondent refused to hire the employees named in paragraph 10 of the complaint during 1992 because they engaged in union or other protected activities while employed by it in 1991.

1. The General Counsel's case

The record reveals that the Union commenced an organizational campaign at Respondent's facility in early August 1991. By the end of August 1991, approximately 56 employees had signed authorization cards.[6] Many of the employees who signed authorization cards were already members of the Union, and solicitation was conducted openly, mainly in Respondent's parking lot before and after work. The Union conducted an open rather than a secretive campaign, and union members and/or adherents, including Amanda Ayers, Bruce Grier, Ben Howe, Larry Carter, P. W. Jenkins, and Michael Kelly, testified they regularly wore T-shirts which were decorated with the Union's logo to work. A number of employees indicated their union affiliation on the employment applications filed with Respondent.

As indicated, supra, Respondent's crew chief, McKinney, excused those stagehands he knew to be union members on August 24, 1991, and he thereafter sought to persuade the stagehands who were not known to be union members or supporters to refrain from joining or supporting the Union. During the meeting, he committed numerous violations of the Act described, supra. As indicated, supra, the Union filed its first petition for an election with Region 11 on August 28, 1991.[7] Thereafter, at a meeting described, supra, which was held on October 4, 1991, Respondent was informed that the Union represented a majority of Respondent's stagehands. As noted, supra, Respondent Attorney Arnold told the union representatives there was no way Blockbuster would ever sign a collective-bargaining agreement; they would not be the first shed in the country to sign one.

While the record reveals that the relationship between Respondent and the Union was somewhat amicable until the October 4 meeting was held, the friendliness disappeared thereafter. Thus, on October 15, the Union picketed the facility during the Tom Petty Show with signs which stated: ''Charlotte Amphitheater does business as Blockbuster Amphitheater does not have a contract with or employ members of IATSE Local 322.'' The following day, October 16, the Union refiled its representation petition with Region 11. On the same date, it filed the original charge in Case 11–CA–14684 alleging that Respondent had discriminatorily refused to hire 18 named union members since October 4, 1991.

In February 1992, Respondent spread the news by word of mouth that it was to hold a meeting to hire stagehands for the 1992 season on February 26, 1992. The meeting was held at the University Hilton in Charlotte, North Carolina, and approximately 135 applicants attended. Respondent's general manager, Robert (Rusty) Vernon, who had been hired in December 1991 after the close of the 1991 season, testified that management was represented at the meeting by: Gerry Duncan, production manager; Patrick Leahey, assistant manager; Truman Nail, comptroller; Pat Harmeson, office administrator, and himself; Vernon described his opening remarks at the meeting as follows (Tr. 893):

> I opened the meeting by defining the meeting as a meeting for new employees. I asked if there were any previous employees present. Some indicated that they were. I told them that this was a meeting for new employees, that they didn't need to fill out all the paperwork that would be duplicative, that they should leave, they didn't need to do that, however, they were welcome to stay, and that was it.
>
> Oh, I did tell them that there would be a subsequent meeting with a notice to them where they would come in and reapply.

[6] See G.C. Exhs. 1–28, 30–33, 35–39, 41, 43–46, 48, and 50–67. All the alleged discriminatees except Byron Fleming, P. W. Jenkins, and Eric Wickstrom signed authorization cards.

[7] G.C. Exh. 61.

The record reveals that some 20–25 former employees were in attendance at the meeting.[8] Although the 1991 employees were invited to leave, the record reveals that most, if not all, remained while employment applications were distributed to persons seeking employment for the first time. A limited number of former employees, including John Fowler, Mike Andrews, Kenny Love, Bill Ellwood, and Darrin Gilmore, obtained and completed new employment applications during the meeting. Vernon credibly testified that those individuals either worked or were offered employment during the 1992 seasons.[9] Most of the previous year's stagehands followed Vernon's instructions and refrained from completing what he had described as duplicative paperwork. One employee, Larry Carter, requested an application form so he could indicate his address had changed since he had worked for Respondent in 1991.[10] In addition to completing employment applications during the February 26 meeting, those attending were given information concerning Respondent's operation and the jobs they might be performing. Significantly, although Vernon and Duncan had decided, before Duncan went on a brief vacation from February 19 to February 25, that Duncan would hold a reapplication/reprocessing meeting with 1991 employees on March 3, 1992, that fact was not announced at the February 26 meeting.[11]

By postcards mailed on Friday, February 28, 1992, Respondent informed former 1991 stagehands that their reapplication session would be held on March 3, 1992.[12] A sample card was placed in evidence as the General Counsel's Exhibit 60. It states the following:

BLOCKBUSTER PAVILION

Tuesday, March 3, 1992
9:30 am.–11:00 a.m.
Administration Offices

Reorientation and reprocessing for
previously employed stagehands

Reapplications accepted at the above times only.
Employment list for 1992 will be closed after
11:00 a.m.

We look forward to seeing you again!

The record reveals that two major entertainment events were scheduled to occur in Charlotte, North Carolina, on March 3, 1992. The first was a rock concert by a group known as U–2. The event was to be held at the Charlotte Coliseum. The second was a trade show which was to be held at the Charlotte Convention Center. Union Business Agent Sprinkle testified the U–2 concert had been widely advertised for more than a month prior to March 3. Vernon and Duncan admitted they were aware when they scheduled the March 3 reapplication meeting for 1991 employees that the U–2 concert was scheduled for March 3, and that it was a big show which required many stagehands. Vernon testified that while he was aware it was to occur, the U–2 concert was not a matter of concern to him when he scheduled the reapplication meeting for March 3, 1992.

Sprinkle testified the Union supplied the U–2 group approximately 60 stagehands, and on the same day, March 3, he provided the trade show at the Convention Center approximately 24 stagehands. The General Counsel witnesses Ayers, Berger, Broadus, Burchett, Laura Carter, Hoffman, Howe, Jenkins, Kelly, Mariette, Murphy, Neely, Redmond, Shumaker, Stevens, Taylor, Welch, Larry Carter, Donnell, Duncan, Fleming, and Holman all testified they were working at either the U–2 concern (the in) or at the trade show at the Convention Center during the hours 9:30 to 11 a.m. on March 3, 1992, and they could not appear at Respondent's facility to register for employment for that reason. Employee Grier, who evidenced an interest in 1992 employment by attending the February 26 meeting, testified he was in Atlanta, Georgia, on vacation on March 3, 1992, and was precluded from attending the reapplication meeting for that reason. Alleged discriminatees Bradley, Bogdan, Griffin, Hunter, McDougald, and Wickstrom did not appear at the hearing to give testimony.

Employees Bergen, Stevens, and Holman testified they saw Duncan at the U–2 concert during the afternoon on March 3. Duncan testified he went to the Charlotte Coliseum to say hello to some friends who worked on the Van Halen crew on Friday, February 28, 1992, but that although he knew some people on the U–2 crew, he did not go to the Coliseum on March 3. Bergen testified he worked at the Charlotte Convention Center in downtown Charlotte until 3–4 p.m. on March 3, and he then went to the Coliseum to work the U–2 out. He placed Duncan at the U–2 concert in a spontaneous manner as he was asked by counsel for Charging Party if he had occasion to speak with Duncan further after discussing his employment status with him in May 1992. The employee replied, ''The only time I saw him was at the U2 concert, but that wasn't even in the summer. That was in March. I said hi to him and that was it.'' When counsel for Charging Party pursued the matter, Bergen indicated he saw Duncan backstage at approximately 6 or 7 p.m.; that he said hi and asked Duncan ''what's up''; and he recalled Duncan said he was just visiting some friends on the tour.[13]

The record reveals that those employees who completed applications at the February 26 and March 3, 1992 meetings, and employees McCown and Lynn attended an orientation session at the Respondent on March 30, 1992. Thereafter,

[8] Among those attending were alleged discriminatees Burchett, Larry Carter, Holman, Howe, Neely, Shumaker, Stevens, Grier, Duncan, Hoffman, Broadus, and Fowler.

[9] Fowler was offered work but testified he refused because of disagreement over pay.

[10] See C.P. Exh. 12. Carter completed the top portion of the card, indicating his new address and his phone number. He was not offered employment during 1992.

[11] While Duncan was positive the March 3 date had been agreed on before he went on vacation, when Vernon was asked during cross-examination if he had announced the March 3 meeting date to those present at the February 26 meeting, he replied, ''No, sir, I didn't. In fact, it may have been that that decision was made at that time.'' At various points Vernon gave misleading testimony such as that described.

[12] Employee Paul Jenkins testified he did not receive the card mailed to him until March 4, 1992.

[13] Duncan's claim that family obligations prevented him from meeting with 1991 employees after 11 a.m. on March 3 is not convincing. I credit Bergen's testimony fully and conclude that Duncan falsely claimed he did not attend the U–2 event on March 3, 1992. In my view, both he and Vernon tailored their testimony regarding the March 3 meeting to fit the needs of Respondent's defense.

they all received or were offered work at the facility during the 1992 season.

The record reveals that alleged discriminatees Laura Carter, Bergen, Welch, Stevens, Neely, Kelly, Shumaker, Murphy, Burchett, Redmond, and Howe filed employment applications with Respondent during March, April, and May 1992. Indeed, Laura Carter testified she filed such an application as early as March 4, 1992. A number of employees, including Robert Bergen, Carl Welch, David Stevens, Michael James Holman, and Michael Murphy, testified after they filed applications for employment in 1992, they called Duncan to ascertain their status and he told them they had been put on a waiting list and/or he would know if they would be given work after a hearing which was to be held in June 1992. None of the named employees received work at Respondent during calendar year 1992.[14]

Summarized, the record reveals the following. Respondent hired stagehands throughout the 1991 season, and that it obtained its riggers directly from the Union during a portion of the season. It reveals the Union commenced an organization drive in August 1991, and that all the named alleged discriminatees except Bryon Fleming, P. W. Jenkins, and Eric Wickstrom signed union authorization cards. Respondent admittedly was aware its employees were seeking to organize, and after the Union filed its original petition for an election, Respondent was advised the Union enjoyed majority support and desired a contract. Respondent indicated it would not be the first ''shed'' in the country to sign a contract. As found, supra, Respondent, through the actions of its crew chief, McKinney, exhibited marked antiunion animus by telling stagehands that those who engaged in union activity would be fired, and by threatening that Respondent would burn its facility before it accepted the Union. After terminating all its employees at the end of the 1991 season, Respondent held a meeting on February 26, 1992, for the purpose of obtaining employment applications, tax forms, and other information from individuals who had not worked for it in 1991. Former employees who attended the meeting were told they should not file new applications because Respondent already had their applications, and they were told they could leave. Two days later on Friday, February 28, Respondent sent postcards to all 1991 employees informing them they could reapply/reregister for 1992 employment at the facility between the hours of 9:30 and 11 a.m. on March 3, 1991. The notifications indicated Respondent's employment list for 1992 would be closed after 11 a.m on March 3, 1992. The record reveals a widely advertised rock concert which would employ a large number of stagehands was scheduled to be held on March 3, 1992. Many of the alleged discriminatees claimed they accepted work at either the U–2 concert or at a trade show which was in progress on March 3 and their work commitment prevented them from appearing at Respondent to reapply and/or reregister for employment. As found, supra, Respondent's production manager continued to engage in violative conduct during the March 3 meeting as he unlawfully interrogated employees concerning their union sentiments and the union sentiments of other employees. Additionally, its crew chief denied an employee work because of her support of the Union. Finally, former Respondent employees who filed applications for employment after March 3, 1992, were not considered for employment by Respondent during the 1992 season although Respondent had hired stagehands throughout the 1991 season.

I find the above-related facts establish, prima facie, that in 1992 Respondent conducted its stagehand hiring procedure in a fashion which was intended to deprive its former stagehands of 1992 employment. In my view, the facts set forth warrant an inference that the union-related activities of Respondent's 1991 stagehands was a ''motivating factor'' in its decision to attempt to deny them employment with it during the 1992 season.

2. Respondent's defense

Vernon testified that in late February and early March 1992, he and his staff of six were working 14 to 18 hours a day to accomplish the numerous tasks required by the approaching 1992 season. He indicated it was in that context that a meeting was scheduled for February 26 at the Hilton Hotel in Charlotte for individuals who desired to work as stagehands for Respondent in 1992, but had not worked for it in 1991. As noted, supra, Vernon ascertained that some former employees appeared at the meeting, and he admittedly told them the meeting was for new employees and that they did not have to complete applications as that would merely be duplicative. While 20–25 former employees attended the meeting and their reapplication/reregistration process would only take a short time, no reason was given for failing to have them update their paperwork at the February 26 meeting. Instead, Vernon testified he told such individuals a meeting would be held for them later.

Vernon indicated during his testimony that he was aware when the March 3 meeting date was set that the U–2 rock group was to perform on that date, and he admitted he knew a large number of stagehands would work the show. He claimed, however, that he gave little consideration to the scheduling of the U–2 concert when he decided on the date and time for the March 3 meeting. With regard to the timing of that meeting, he testified his main concern was that he wanted Duncan to conduct the meeting as he would be supervising the stagehands, and Duncan had indicated he would be available in early March only during the morning hours of March 3.[15] Vernon added that he decided the meeting should be held in early March as he wanted to complete the employee application process about a month before the season started.

Respondent contends in its brief that it would have been difficult, if not impossible, for it to choose a day for reapplication/reregistration of 1991 employees which would not have been found to be objectionable by the Union as entertainment events were scheduled for almost every weekday in late February and early March. In support of that claim,

[14] It is undisputed that Respondent hired stagehands throughout the season in 1991.

[15] When Duncan was asked to explain why the meeting was held on March 3 from 9:30 to 11 a.m., he became hopelessly confused and answered:

> Traditionally I went to Camden on Mondays, Wednesdays and Fridays. I told him I was available on Monday morning, because my wife had me doing some work for her and that particular week I could not make it to the—down to Camden on Friday, because again, I had to do something with my children and I had to go to Camden on Monday, Wednesday and Thursday. So, Tuesday morning was the only available date to me.

it placed Respondent's Exhibits 11 and 17 in the record. Generally described, the documents reveal some events requiring the use of stagehands were scheduled during most workdays, particularly during the last week of February and the first week of March 1992.[16]

When he was asked why Respondent closed its 1992 employee call list at 11 a.m. on March 3, rather than continue to accept employment applications thereafter, Vernon claimed that was done because his small staff was too busy to accept applications and Respondent did not hire a receptionist until April 1, 1992.

While the General Counsel and Charging Party rely heavily on testimony given by employee McCown, which was to the effect that she and employee Lynn executed employment applications at Panter's home on March 18, 1992, Respondent observes that it was stipulated near the close of the hearing that if one Rocky Scarfone, the owner of a nightclub called Rocky's, appeared to testify, he would testify that Panter was at his club from early evening hours to 3 a.m. on both March 17 and 18, 1992. In view of the described stipulation, I am not inclined to find that McCown and Lynn visited Panter's home on March 17 or 18, 1992.[17]

Referring to Respondent's Exhibit 1, a union document which reveals who worked the in, the show, and the out during the U–2 concert, Respondent observes in brief that, contrary to their testimony, employees Larry Carter, Donnell, Duncan, and Holman did not work the U–2 in. Inspection of the document reveals Respondent's contention is accurate. Accordingly, in the absence of any explanation, I find that Carter, Donnell, Duncan, and Holman have failed to indicate why they could not have appeared at Respondent's facility to reapply and/or reregister for employment on March 3, 1992, if they desired 1992 employment.[18]

In addition to seeking to establish that the above-named employees could have attended the March 3 meeting if they desired 1992 employment, Respondent observed that alleged discriminatees, Bradley, Bogdan, Fleming, Griffin, Hunter, McDougald, and Wickstrom, did not appear at the hearing to give testimony. In the situation described, Respondent submits the record fails to reveal they were interested in employment with it in 1992, and, in any event, the record fails to establish they were unable to attend the March 3, 1992 meeting. In the same vein, Respondent observes that the record fails to reveal that any individual contacted it prior to the March 3 meeting to indicate they could not attend the meeting and/or wanted to make a different arrangement for updating their employment application.

[16] The General Counsel contends in his brief that no events were scheduled for Monday, March 2, 1992. The record reveals the trade show at the Charlotte Convention Center started that date and Sprinkle testified he referred some 24 stagehands to that event.

[17] Respondent sought, through testimony of its controller, Nail, to establish that McCown and Lynn's employment application were not received by Respondent after March 3, 1992. His testimony is inconclusive as he did not know what documents were used to obtain the names and addresses of individuals who were asked to attend a March 30, 1992 orientation meeting.

[18] The record reveals that Holman did seek work at Respondent in 1992 by attending the February 26, 1992 meeting and by filing an application for employment with it during the spring of 1992.

3. Conclusions

Respondent contends the record reveals its 1992 hiring procedures were facially neutral, were evenhandedly applied, and were, therefore, lawful. Citing *NLRB v. Community Shops*, 301 F.2d 263 (7th Cir. 1962), it contends that since its hiring policy was facially neutral, the General Counsel must show a specific unlawful intention on the part of the employer to discriminate in order to prevail.

Contrary to Respondent, I find for the reasons set forth below that Respondent's 1992 hiring procedures were not, in the circumstances revealed by the instant record, applied evenhandedly.

As revealed, supra, Respondent's 1992 hiring procedures commenced with the conduct of a meeting on February 26, 1992, the record reveals some 20–25 experienced stagehands who had been employed in 1991 attended the meeting. Patently, by attending the meeting, the former employees were evidencing a desire to obtain employment with Respondent during the 1992 season. While the record reveals that such employees could have updated their personnel records in a very short period of time, Respondent discouraged them from completing any paperwork and told them the meeting was for individuals who had never worked for it before.

During the February 26 meeting, Vernon informed the 1991 former employees that a meeting would be held for them in the future. No date was specified even though Duncan credibly testified he and Vernon had decided prior to the time he went on vacation on February 19 that the meeting for 1991 employees would be held on March 3 during the hours 9:30 to 11 a.m. I infer that Vernon did not tell the former employees on February 26 that their meeting would take place on March 3 because he did not want them to know the date of the meeting that far in advance.

I turn now to consideration of the March 3, 1992 meeting for former employees. Vernon claimed during his testimony that the date of March 3 was chosen because he wanted Duncan to conduct the meeting, and the hours of 9:30 to 11 a.m. were selected because Duncan had family commitments which prevented him from devoting more time to the meeting. Significantly, while Vernon admitted he knew the U–2 concert, which required many stagehands, would be held at the Charlotte Coliseum on March 3, he denied that had anything to do with the date or time chosen for the meeting.

As noted, supra, Duncan became somewhat incoherent when he was asked to explain how the date and time of the March 3 meeting were decided on. In the end, he claimed the date was selected because it was the only date he was available in early March, and he claimed the time was limited to 1-1/2 hours because he had family commitments that afternoon. When he was asked if he visited the Charlotte Coliseum the afternoon, he denied he had. As noted, supra, credible employee testimony reveals that Duncan did visit the Coliseum on the afternoon of March 3.

In sum, I conclude that Duncan tailored his testimony to a significant extent to explain why the March 3 date and times were chosen for the meeting with former employees. In the circumstances revealed by the record, I do not credit Vernon's claim that the scheduled U–2 concert had nothing to do with the selection of the date for the meeting, and, in the absence of corroboration, I do not credit Duncan's claim that he had family obligations to fill on March 3.

Patently, by limiting the former employees' opportunity to qualify for employment with it in 1992 to the hours 9:30 to 11 a.m. on March 3, 1992, Respondent engaged in conduct which was not evenhanded. As noted, supra, the record reveals that Respondent accepted and acted on employment applications throughout the 1991 season. In an attempt to supply a business-related reason for ceasing to consider further employees for inclusion on the 1992 call list after 11 a.m on March 3, 1992, Vernon testified Respondent had no clerical help to accept applications between March 3 and April 1 when it hired a receptionist, and that he wanted to complete the hiring procedures about a month prior to the opening of the season. Quite apart from the fact that Respondent knew before setting the described time limits that the U–2 group was to play in Charlotte on March 3, it, by giving what must be described as a ''last minute'' notice of the March 3 meeting date, could necessarily anticipate that a number of the invitees would be unable to attend the meeting on such short notice due to prior commitments. I infer that such a result was intended, and I find that by limiting the time during which 1991 employees could qualify for placement on its 1992 call list to 1-1/2 hours on March 3, 1992, Respondent was not acting evenhandedly.

In sum, the following indicia, coupled with the 8(a)(1) violations committed by McKinney, Duncan, and Panter, which are set forth supra, cause me to conclude that Respondent refused to rehire stagehands who had worked for it in 1991 in 1992 pursuant to a plan to dissipate the Union's majority standing among its employees: (1) the refusal to permit the 20–25 former employees attending the February 26, 1992 meeting to update their employment information; (2) the failure to announce on February 26, 1992, the previously scheduled meeting for 1991 employees on March 3, 1992; (3) the intentional scheduling of a meeting for former employees on a day when a large concert attended by numerous stagehands was scheduled; (4) the posting of a last-minute notification that a meeting would be held for former employees on March 3, 1992; (5) the limitation of acceptance of employment data from former employees to a 1-1/2-hour period on March 3, 1992; and, (6) unlike the practice in 1991, the refusal to accept employment information from former employees after 11 a.m on March 3, 1992.

With respect to Respondent's claim that the General Counsel must show that Respondent had a specific intent to discriminate against its 1991 employees when it engaged in the described actions at the February and March meetings, I find the record contains sufficient evidence of purpose to establish discriminatory intent. Specifically, the 8(a)(1) violations found in the statements and actions of Supervisors McKinney, Panter, and Duncan and the on 8(a)(3) discrimination underlying the refusals to call employees Shumaker and Canady to work support the conclusion that antiunion animus pervaded the Respondent's refusal to consider former employees for 1992 employment after March 3, 1992. Moreover, noting that all the alleged discriminatees except *Fleming, Jenkins*, and *Wickstrom* have been shown to have executed authorization cards for the Union while employed by Respondent in 1991, I find that by refusing to consider members of that group for employment during the pendency of a petition for an election among Respondent's stagehand employees, Respondent engaged in conduct which was ''inherently destructive'' of important employee rights. In such situations, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if an employer introduces evidence that the conduct was motivated by business considerations. *Borg Warner Corp*., 245 NLRB 513 (1979); *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

For the reasons stated, I find that Respondent has failed to establish that it would have refused to hire its former employees who failed to supply it with updated employment information prior to the March 3, 1992 deadline in the absence of their participation in protected activity and/or their support of the Union. By engaging in such action, I find that Respondent violated Section 8(a)(1) and (3) of the Act. I specifically find that Respondent unlawfully refused to consider the following named employees for employment in 1992: Amanda Ayers, Bob Bergen, John Broadus, Dean Burchett, Laura Carter, Byron Fleming, Bruce Grier, Karl Hoffman, Benjamin Howe, P. W. Jenkins, Mike Kelly, Michael Mariette, Mike Murphy, Michael Neely, Sharon Redmond, James Shumaker, David Stevens, Craig Taylor, Carl Welch, and James Holman.

Respondent contends in brief that General Counsel did not prove that it discriminatorily refused to hire (1) the alleged discriminatees who did not appear at the hearing to give testimony and (2) those employees who falsely testified they were unable to attend the March 3 meeting because they were working the in at the U–2 concert. I agree in part.

The alleged discriminatees named in paragraph 10 of the complaint who did not appear to give testimony during the proceeding are Freedom, Bradley, Joe Bogdan, Ernest Griffin, Calvin Hunter, Gerald McDougald, and Eric Wickstrom. As the General Counsel failed to establish that the named individuals remained available for employment in the Charlotte, North Carolina area during 1992, and that they desired employment at Respondent, I recommend that the complaint be dismissed as to them.

The alleged discriminatees who failed to establish that they were prevented from attending the March 3, 1992 meeting because they were working the in at the U–2 concert are Larry Carter, Bob Donnell, Jim Duncan, and James Holman. As the record reveals the first three named individuals were in the Charlotte, North Carolina area on March 3, 1992, and they failed to give a truthful reason for not attending Respondent's March 3, 1992 meeting for former employees. I find that the General Counsel failed to establish that they were denied employment by Respondent in 1992 for discriminatory reasons. I recommend the complaint be dismissed as to them. With respect to Holman, the record reveals that he sought 1992 employment with Respondent by attending the February 26, 1992 meeting and by filing an application for employment during the spring of 1992. He, together with other employees, was denied consideration for employment pursuant to Respondent's plan to dissipate the Union's majority status. Accordingly, I find that by denying Holman consideration for employment in 1992, Respondent violated Section 8(a)(1) and (3) of the Act.

D. *The Request for a Gissel Remedy*

1. The appropriate bargaining unit

Paragraph 12 of the complaint alleges the following to be a unit appropriate for bargaining within the meaning of Section 9(b) of the Act:

> All riggers, spot light operators, loaders, forklift operators, stage craft and wardrobe employees employed by Respondent at its Charlotte, North Carolina facility excluding all other employees, guards and supervisors as defined in the Act.

Respondent contends any unit found to be appropriate should include crew chiefs and maintenance employees and should exclude wardrobe employees and independent contractors.

The instant record reveals that Respondent has treated stagehand employees as a separate and distinct group throughout the 1991 and 1992 seasons. Thus, it reveals that stagehands have been hired by Respondent's crew chief after attending meetings held for stagehand applicants only; that stagehands perform work only on days when entertainment is presented; that the work of stagehands is solely related to the presentation of entertainment; that stagehands are supervised by both Respondent supervisory personnel and personnel of various entertainment groups; that stagehands are identified as a separate employee group as they wear black T-shirts while working; that such employees' earnings are determined by the segments of the show which they work and that they are paid a minimum call of 4 hours, but receive no premium pay for overtime hours worked; and the work of stagehands is critiqued at meetings held for stagehands only after their work during a given event is completed.

As noted in the briefs filed by the General Counsel and Charging Party, the Board has long recognized that stagehands have a separate and identifiable community of interest apart from other employees by virtue of the specialized nature of their job functions, and it has found such units of employees to be appropriate units for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. *Six Flags Over Georgia*, 215 NLRB 809, 810 (1974); *American Zoetrope Productions*, 207 NLRB 621 (1973). Citing *Broadway Catering Corp*., 260 NLRB 1200 (1982), the Respondent contends that its crew chief and the maintenance employees employed by it during the 1991 share a sufficient community of interest with stagehands as to require their inclusion in any unit found to be appropriate.

With respect to maintenance employees, the record reveals that, at different times during the 1991 season, Respondent employed five such employees. In support of the contention that they share a community of interest with stagehands, Respondent observes that General Manager Vernon testified that maintenance employees frequently work on stage with stagehands performing electrical work on house wiring; they use the same restrooms, lunchroom, and facility entrance; they are both hourly paid; and that, as general manager, Vernon is responsible for supervising the entire staff of the facility, including maintenance and stagehand employees. While the described areas of commonality do exist, the record reveals that, unlike stagehands who work only on days when entertainment is presented, maintenance employees are employed throughout the workweek from the beginning of the season until shortly before Christmas. Unlike the hands, the maintenance employees take no active part in presentation of entertainment; they are hired by someone other than the crew chief; and they receive their immediate supervision from the general manager or his assistant rather than from the crew chief, the production managers, or show personnel. Finally, the record fails to reveals that there is any interchange between the stagehand and the maintenance personnel.

In sum, I find that the record reveals that stagehands are a separate and distinct group and that Respondent has failed to establish that maintenance employees share sufficient community of interest with stagehands to require their inclusion in any unit found to be appropriate. I have considered the Board's decision in *Broadway Catering Corp*., supra, cited by Respondent and find that case to be distinguishable as the unique nature of the employer's business which existed in that case has not been shown to exist in the instant case.

As I have found, supra, that Respondent's crew chiefs are supervisors within the meaning of Section 2(11) of the Act, I find they should be excluded from the unit.

Noting that wardrobe employees participate meaningfully in the preparation and presentation of entertainment events by performing wardrobe unloading and unpacking; accomplishing sewing repairs and pressing of garments; assisting in the dressing, changing, and undressing of performers; and accomplishing repacking of garments and wardrobe, I find that wardrobe employees who are placed on Respondent's payroll are properly included in the unit. I find that independent contractors who participate in the presentation of entertainment at Respondent's facility, who are engaged by the entertaining group, are not properly included in the unit. Insufficient evidence was adduced to establish whether contractors employed by Respondent are employees or independent contractors.

For the reasons stated, I find the following to be an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> All riggers, spot light operators, loaders, forklift operators, stage craft and wardrobe employees employed by Respondent at its Charlotte, North Carolina facility excluding all other employees, guards and supervisors as defined in the Act.

2. The Union's majority status

Joint Exhibits 1(a) and (b), stipulated to be a listing of stagehands employed by Respondent during the 1991 season, reveals Respondent employed 97 stagehands during the 1991 season. Review of Joint Exhibit 1(b), which is a summary of Joint Exhibit 1(a), together with Respondent's Exhibit 14, payroll information, reveals that 26 of the 97 employees worked only one show during the 1991 season.[19]

In *Medion Inc*., 200 NLRB 1013 (1972), the Board considered a situation wherein employees, as in the instant case, sometimes worked for only a day and were then laid off without any promise of reemployment. When work was available again, the employer recalled those who had proved satisfactory in the past. The formula chosen by the Board in *Medion* was to give a vote to any employee employed by Medion on at least two productions for a minimum of 5 working days during the year preceding the issuance of the Board's decision, if they had not quit or been terminated for

[19] Ayres, Bass, Fish, Fuller, Golden, Hatley, Hellman, Hill, Jamison, Dan Jones, Mariette, Martin, Massachi, McCabe, P. Murphy, Perry, Raisbeck, Redden, Reed, Roark, Schochet, Sheldrick, Sparks, Stinson, Vandervort, and Williford.

cause. Subsequently, in *American Zoetrope Productions*, 207 NLRB 621 (1973), the Board applied the general approach it had taken in *Medion* and found eligible to vote employees who had worked on at least two productions as it appeared most unit jobs lasted only 1 or 2 days as opposed to 5 days as in *Medion*.[20] I find the instant situation to be substantially like the situation which existed in *American Zoetrope Productions*, and, accordingly, find that authorization cards of employees who worked on two or more productions during Respondent's 1991 season should be counted to ascertain whether the Union represented a majority of employees in the appropriate bargaining unit on October 17, 1991. See also *Transfilm, Inc*., supra, and *Independent Motion Picture Producers*, supra.

As indicated, supra, the Union filed a petition in Case 11–RC–5796 on August 28, 1991. The unit set forth in the petition was identical to the one I have found to be an appropriate unit, supra. Thereafter, at the October 4, 1991, meeting, the Union claimed to represent a majority of Respondent's stagehands, and it indicated it desired that Respondent enter a contract with it regarding those employees. Respondent refused. I find that by filing the described petition and taking the October 4, 1991 action, the Union made a valid demand for recognition as the bargaining agent of employees in an appropriate unit.

During the hearing, the General Counsel amended the complaint to allege that the Union has enjoyed majority status since August 28, 1991, and continuing thereafter, and more particularly since October 17, 1991. My review of the record reveals that on or before August 28, 1991, 50 Respondent employees had signed authorization cards.[21] Five of those employees worked for Respondent only 1 day during the 1991 season, and their authorization cards cannot properly be counted. They are: Mariette, Murphy, Williford, Stimson, and Susan Lorenz. Thus, on August 28, 1991, I find that the Union represented 45 employees by virtue of their execution of valid authorization cards.[22] As the number of employees in the unit as of that date was 71, the Union enjoyed majority status as of August 28, 1991. By October 17, 1991, five additional employees had executed valid authorization cards (Burchett, Fulbright, Redmond, Bradley, and Griffin).[23] It is clear that the Union, which then had 51 valid authorization cards signed, represented a majority of the employees in the appropriate unit.

3. Appropriateness of a bargaining order

The General Counsel and Charging Party contend a bargaining order should issue in the case under the teachings of *NLRB v. Gissel Packing Co*., 395 U.S. 575, 614 (1969). In making this argument, they contend the unfair labor practices committed by Respondent fell within the second category of cases outlined in *Gissel*, i.e., cases where the unfair labor practices are less pervasive than those outlined in the first *Gissel* category, but still so serious or egregious that the possibility of erasing the effects of such practices by the use of traditional remedies is so slight as to render uncertain the possibility of a fair election and making reliance on union authorization cards a more reliable basis for determining union majority status. I agree.

Here, the record reveals that shortly after the employees began their organizing activities on behalf of the Union, Respondent embarked on a course of conduct designed to undermine the Union's strength. Thus, Crew Chief McKinney informed 20–25 employees on August 24, 1991, that Respondent would fire them if they signed union authorization cards, and that it would burn the facility before it would permit it to be unionized. The Board has held, with court approval, that threats of plant closure and discharge are ''hallmark'' violations which are ''among the most flagrant'' of unfair labor practices. *Action Auto Stores*, 298 NLRB 875 (1990) (citing *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1301–1302 (6th Cir. 1988), enfg. 287 NLRB 796 (1987)). After engaging in the above-described activity, McKinney intimidated an employee in violation of Section 8(a)(1) and Respondent violated Section 8(a)(3) by refusing to call an employee for a show because of his ''union stance.''

Respondent, observing that the Union is claimed to have attained majority status despite the commission of unfair labor practices, argues that unfair labor practices committed by Respondent in 1991 would not warrant issuance of a bargaining order. I agree, but hasten to observe that Respondent continued its efforts to undermine the Union's strength in 1992. Thus, as found, supra, during February and March, it conducted its hiring procedures for the 1992 season in a manner which violated Section 8(a)(3) and deprived 20 former employees who had signed authorization cards for the Union of employment at its facility in 1992. During the same months, it hired some 101 stagehand employees, only 23 of which had worked for it in 1991.[24] Finally, it continued to intimidate employees in violation of Section 8(a)(1) by interrogating them concerning their union sentiments and the sentiments of other employees, and by continuing to violate Section 8(a)(3) by refusing to call an employee to work shows because she engaged in union activities.

Considering all the foregoing, including, in particular, the fact that Respondent practically replaced the 1991 stagehand crew lock, stock, and barrel in 1992, I conclude the possibility of erasing the effect of Respondent's unfair labor practices and ensuring a fair election by use of traditional rem-

[20] Long ago, in *Transfilm, Inc*., 100 NLRB 78 (1952), and in *Independent Motion Picture Producers Assn*., 123 NLRB 1942 (1959), the Board found that a single day's employment is too casual to establish the bargaining interest of a prospective voter.

[21] Mariette, Bergen, Hoffman, Duncan, Donnell, Ruth Taylor, Laura Carter, Janice Lorenz, Broadus, Grier, Welch, Michael Kelly, Stevens, Neely, Canady, Holman, Shumaker, Jenkins, Michael Murphy, Phillip Murphy, Williams, Kawamoto, Miller, Lawrence Carter, McManus, Andrews, Patrick Kelly, Lewis, Millsap, Severs, Smith, Yancy, Weslie Taylor, Fowler, Howe, Barbee, Fleming, Hawk, Hunter, Letto, McDougald, Reber, Winkler, Stimson, Cook, Bogdan, Ayers, Susan Lorenz, Martin, and Curry.

[22] Charging Party urges me to compare employee Jerry Lee Curry's card signature (G.C. Exh. 67) with his W–4 form signature (G.C. Exh. 68) and receive the card in evidence. I refrain from so doing as Charging Party failed to establish that the W–4 form in question constituted a record kept by Respondent in the ordinary course of business.

[23] Respondent claims Redmond's card is not valid because she originally placed another employee's name on the card. The card now designates ''Blockbuster Pav'' as the employer and indicates Redmond worked as a ''stagehand.'' I find the card, which contains no ambiguities, to be valid.

[24] R. Exh. 16.

edies is slight. Accordingly, I conclude that employee sentiment expressed through authorization cards would be better protected by issuance of a bargaining order in this case. As the Board said in *Brenal Electric*, 271 NLRB 1557, 1558 (1984), ''To hold otherwise in this case would allow Respondent to benefit from its unlawful conduct.'' Accordingly, I find the Respondent violated Section 8(a)(5) of the Act by refusing the Union's request for recognition and bargaining on October 4, 1991. Consistent with the Board's policy as set forth in *Trading Port*, 219 NLRB 298 (1975), I recommend issuance of a bargaining order applied retroactively to October 4, 1991, the date of the Union's request for bargaining, and following the date on which Respondent embarked on its unfair labor practice campaign.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All riggers, spot light operators, loaders, forklift operators, stage craft and wardrobe employees employed by Respondent at its Charlotte, North Carolina facility excluding all other employees, guards and supervisors as defined in the Act.

4. Commencing about August 28, 1991, and continuing thereafter, the Union was designated by a majority of Respondent's employees in the bargaining unit described above as the exclusive collective-bargaining representative.

5. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by informing employees they were denied work opportunities because they engaged in union activities; threatening employees with discharge if they engaged in union activity; threatening to burn its facility before allowing the Union to represent its employees; interrogating employees concerning their union sentiments and the union sentiments of other employees; and threatening not to give work to employees who promoted the Union.

6. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by refusing to call James Shumaker to work a show on September 12, 1991; by refusing Katherine Canady work after July 16, 1991; and by refusing to consider for employment during the 1992 season the 20 employees named below in the the remedy section of this decision.

7. By refusing to recognize and bargain with the Union as the exclusive bargaining representative of its employees in the appropriate unit set out above on and after October 4, 1991, while engaging in serious and egregious unfair labor practices set out above, Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

8. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily refused to call employee James Shumaker to work a show on September 12, 1991, and having found that it discriminatorily limited employee Katherine Canady's work opportunities after July 16, 1992, during its 1992 season, I shall recommend that it be required to make the named employees whole for any loss of earnings they may have suffered by reason of the discrimination against them, with interest. Having found that Respondent discriminatorily refused to consider the 20 employees named below for employment during the 1992 season, I shall recommend that it be required to offer them immediate employment as stagehands, at the start of the 1993 season and that it be required to make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, with interest. Backpay is to be computed in accordance with the formula provided in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent violated Section 8(a)(5) of the Act and that a bargaining order is appropriate in the circumstances of this case, consistent with the Board's policy set forth in *Trading Port*, supra, and applied in *Donelson Packing Co*., 220 NLRB 1043 (1975), enfd. 569 F.2d 430 (6th Cir. 1978), I shall recommend that the bargaining order shall be made effective from October 4, 1991, the date of the Union's request for recognition and bargaining after Respondent had commenced its unfair labor practices and after the Union had obtained its majority status on August 28, 1991.

Charging Party requests in its brief that Respondent be required, in addition to posting a notice to employees at its facility, to mail signed copies of the notice to all employees on the Respondent's call list during the 1991 and 1992 seasons. I find, instead, that the same general purpose can be accomplished by providing the Union with signed copies of the notice to employees for posting at its union hall if it is willing to do so.

The employees unlawfully denied consideration for employment during the 1992 season are Amanda Ayers, Bob Bergen, John Broadus, Dean Burchett, Laura Carter, Byron Fleming, Bruce Grier, Karl Hoffman, Benjamin Howe, P. W. Jenkins, Mike Kelly, Michael Mariette, Mike Murphy, Michael Neely, Sharon Redmond, James Shumaker, David Stevens, Craig Taylor, Carl Welch, and James Holman.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

[25] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Charlotte Amphitheater Corporation d/b/a Blockbuster Pavilion, Charlotte, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees they were denied work opportunities because they engaged in union activities.

(b) Threatening employees with discharge if they engage in union activity.

(c) Threatening to burn its facility before allowing the Union to represent employees.

(d) Interrogating employees concerning their union sentiments and the union sentiments of other employees.

(e) Threatening not to give work to employees who promote the Union.

(f) Denying employees work opportunities because they join or support the Union.

(g) Refusing to consider former employees for employment in order to undermine the strength and majority standing of the Union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole employees James Shumaker, Katherine Canady, and the 20 employees named in the the remedy section of this decision for loss of earnings they suffered as a result of the discrimination against them, with interest, and, at the beginning of the 1993 season, offer immediate employment as stagehands to the 20 employees whose names are set forth herein.

(b) Recognize and, on request, bargain in good faith with International Alliance of Theatrical Stage Employees and Moving Picture Operators, Local 322, as the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit set forth below, and, if an understanding is reached, reduce the agreement to writing and sign it. The appropriate unit is:

> All riggers, spot light operators, loaders, forklift operators, stage craft and wardrobe employees employed by Respondent at its Charlotte, North Carolina facility excluding all other employees, guards and supervisors as defined in the Act.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at Respondent's Charlotte, North Carolina facility copies of the attached notice marked ''Appendix.''[26] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt and be maintained by Respondent for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material. Signed copies of such notice to employees shall be mailed to the Union for posting, if it desires to do so.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''